

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
AMENDMENT TO**

**TITLE 10, CHAPTER 5, SUBCHAPTER 3 OF THE CALIFORNIA CODE OF
REGULATIONS**

TO ADD

ARTICLE 11.3 Mutual Fund Investments in Variable Products

TEXT OF REGULATIONS

TITLE 10. Investment
Chapter 5. Insurance Commissioner
Subchapter 3. Insurers
Article 11.3. Mutual Fund Investments in Variable Products

§2534.40. Purpose.

The purpose of this article is to implement the provisions of Insurance Code Section 10506, subdivision (h) as amended by Assembly Bill 2778 (Calderon) (Statutes of 2002, Chapter 347). Pursuant to the statute, these regulations supercede Insurance Department Bulletin 97-2.

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.

§2534.41. Material Changes subject to Commissioner's Prior Approval.

If the Commissioner determines that a filing involving material changes involving non--mutual fund investments or private placement investments fails to comply with filing requirements or is incomplete, as described in Section 2534.46(c) of these regulations, the Commissioner shall issue a letter rejecting the filing for a material change. Pursuant to Insurance Code Section 10506, subdivision (h), material changes involving Mutual Fund Investments are not subject to the Commissioner's prior approval or acknowledgement prior to implementation.

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.

§2534.42. Definitions.

- (a) For purposes of this article, Mutual Fund Investments include but are not limited to, investments that are registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940 (15 U.S.C. 80b-1, et seq.). Private placement investments involving non--mutual fund investments are specifically excluded from this definition.

- (b) Filings with the Commissioner, pursuant to Section 2534.46 of this article, are deemed to be notifications as delineated in Insurance Code Section 10506, subdivision (h).

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.

§2534.43. Notifications and Procedures Concerning Hazardous Operations.

If mutual fund investments are involved in a variable product, such product may be reviewed to determine if the investments involve hazardous operations.

A hazardous condition shall not exist if the variable contract issued, or issued for delivery, in this state:

- (1) has underlying investment portfolio(s) that are registered under the Investment Company Act of 1940, regardless of whether such underlying portfolio(s) meet the criteria set forth in Section 2534.45 of these regulations;
- (2) is issued in connection with a plan that is subject to the fiduciary standards of the Employee Retirement Income Security Act of 1974 (ERISA);
- (3) is a variable life insurance contract issued under California Insurance Code Section 10506.3 and Insurance Department Bulletin 87-3 (as revised);
- (4) is issued under California Insurance Code Section 10541 to entities such as a trust or foundation;
- (5) is issued in connection with a welfare benefit, deferred compensation, pension, profit sharing, or retirement plan established or maintained by or for a plan sponsor; or is issued only to "accredited investors" as that term is defined in Section 501(a) of Regulation D, promulgated under the Securities Act of 1933, as amended.

Notwithstanding the above, the Commissioner reserves the right to review for possible hazardous conditions any variable contract falling into any of the above categories where he deems there is good cause to believe that the issuance of such a contract may pose a hazard to California policyholders or the public, or where he finds that any material risk is not adequately disclosed.

If the Commissioner determines that hazardous operations are involved, the following procedure will be utilized:

- (a) The insurer will be notified of the Commissioner's initial finding regarding hazardous operations. At that time, the insurer will be given a reasonable opportunity to present a response consisting of evidence to refute the Commissioner's initial findings. Such response shall be given within 30 days of the service of the Commissioner's initial findings.
- (b) If the insurer fails to provide satisfactory evidence that hazardous operations are not involved in the variable product, pursuant to the authority of Article 14.5., Chapter 1., Part 2., Division 1. of the Insurance Code, commencing with section 1065.1, the Commissioner shall issue such order or orders as are necessary to support his or her

findings regarding hazardous operations; such orders shall include but not be limited to the prohibition of the sale, issuance and delivery of an insurance policy or contract. The Commissioner may exercise all other powers provided in Article 14.5. Any hearing held pursuant to this article shall be before an administrative law judge of the Administrative Hearing Bureau of the Department of Insurance.

NOTE: Authorities cited: Section 1065.1, et seq. and Section 10506, subdivision (h) Insurance Code. References: Section 1065.1, et seq. and Section 10506, subdivision (h) Insurance Code.

§2534.44. Hazardous Operations Not Involving Mutual Fund Investments.

- (a) If mutual fund investments are not involved in a variable product, such product will be reviewed to determine if the investments involve hazardous operations. If the Commissioner determines that hazardous operations are involved, the insurer will be notified of the Commissioner's initial finding pursuant to section 2534.43 of this article.
- (b) If the hazardous condition is not corrected, the Commissioner shall issue a notice of disapproval.

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.

§2534.45. Factors Determining the Existence of Hazardous Operations.

- (a) When a variable annuity is utilized for retirement purposes, it shall be deemed that the prospective purchaser or contract holder holds the viewpoints and expectations of a reasonably prudent investor. The reasonably prudent investor generally does not participate in highly speculative investments, but does have expectations of a reasonable rate of return on his or her investment. Over the long term, such an investor expects to see moderate growth in his or her investment, over a time frame consistent with his or her retirement plans and taking into account his or her ability to make appropriate investment strategy changes as conditions and expectations change over time.
- (b) However, the types of investments and degrees of investment risks appropriate for a reasonably prudent investor should be determined in light of the specific situation and characteristics of a given individual. Factors to be considered include the individual's age, wealth, other investments, dependents and financial obligations, long term financial prospects, lifestyle preferences, and tolerance of risk.
- (c) In addition, pursuant to the National Association of Securities Dealers Conduct Rule 2310, as well as Insurance Department Bulletin 87-3 (dealing with variable life insurance), brokers and agents selling variable products must comply with suitability standards. Such standards obligate the broker or agent to make certain that there are reasonable grounds for believing that a variable contract recommended to a customer is suitable for that customer. It is expected that due diligence will be given to the consideration of suitability by brokers and agents licensed to sell variable contracts in California.

- (d) A variable annuity shall be considered hazardous to policyholders, and to the public, when the variable annuity contract, viewed as a whole, and from the viewpoint of a reasonably prudent investor, is so risky an investment that it seriously jeopardizes the retirement expectations of the investor. If the investor's reasonable retirement expectations are in jeopardy of remaining substantially unfulfilled, the presumption could arise that the contract is hazardous.
- (e) A variable life insurance contract shall be considered hazardous to policyholders, and to the public, when the variable life insurance contract, viewed as a whole, and from the viewpoint of a reasonably prudent investor, contains risky investment options which the Commissioner deems excessive. In addition, such options jeopardize the realization of a fair, investment return, over a long period of time. Where the insurer informs the investor of a significant number of risks and uses an unusually large number of caveats in its explanation of the policy and its investment options, a presumption shall arise that the policy is hazardous.
- (f) To the extent that an insurer's financial condition, or methods of operation, places the reasonable prudent investor in jeopardy of having his or her investment expectations substantially unfulfilled, that financial condition or business operation shall be presumed to be hazardous.
- (g) The presence of the following factors may raise a presumption that hazardous operations are involved in a variable product, fund or subaccount.
 - (1) Operations are delegated to a third party that is not a lawfully licensed agent of the company.
 - (2) The General Assets of an insurer are disproportionately small in relation to Separate Account assets. A ratio in excess of one to two may be considered hazardous if the insurer's surplus appears to be inadequate to support the possible obligations the insurer owes to policyholders of variable contracts issued from its Separate Account. For example, if an insurer has \$10 million of assets in its General Account, and more than \$20 million of assets in its Separate Account, the Commissioner may consider its condition to be considered hazardous.
 - (3) The name of the subaccount is deceptive.
 - (4) The investment restrictions of the subaccount permit it to invest more than 20% of its assets in bonds rated less than investment grade, by a bond-rating agency such as Moody's or Standard and Poors. Such an investment will not be permitted unless the subaccount specifically identifies and discloses the nature of the investment and the attendant risks associated with it.
 - (5) The investment restrictions of the subaccount permit borrowings to reach a level greater than 33 1/3% of its total assets.
 - (6) The investment restrictions of the subaccount permit it to hedge by purchasing put and call options, futures contracts, or derivative instruments on securities in an aggregate amount equivalent to more than 10% of its total assets.
 - (7) The number of investment subaccounts available for the variable contract holder to choose from is excessive, in the reasonable judgment of the Commissioner, or is so complex or duplicative, as to make the process of

choosing a subaccount unreasonably complicated for a reasonably prudent person.

- (8) The investment adviser or subadviser does not possess sufficient investment experience in order to render reliable investment advice. Advisers must be of good professional character and in good standing with the securities licensing authorities having jurisdiction over them.
- (9) The portfolio turnover rate is excessive in relation to the investment goals of the subaccount. A high portfolio turnover rate shall not be considered excessive if it is consistent with the investment objectives of the portfolio or subaccount.
- (10) An index subaccount must substantially mirror the stock index upon which it is based.
- (11) References to rating services, such as A.M. Best, in advertising must explain the nature and purpose of the rating. The reference must clearly indicate that the rating does not apply to the insurer's Separate Account(s).
- (12) Hazard may exist if the entire assets of the Separate Account are composed wholly, or in very large part, of investments in other Separate Accounts, not under the direct control of the insurer. In such situations, hazard will exist if the liquidity of the Separate Account is impaired.
- (13) Hazard may exist if investments are made directly in gold and/or silver bullion which, when combined, exceed 109% of the assets of the underlying subaccount.
- (14) Hazard may exist in non-income producing real estate. Such investments will be presumed speculative.

Concerning International and Global Portfolios or Subaccounts:

- (15) Such subaccounts must be sufficiently diversified. Diversification requires that investments must be made in a minimum of three different countries at all times. The subaccount must not invest more than 50% of its assets in any second tier country or more than 25% of its assets in any third tier country. First tier countries are defined as Germany, the United Kingdom, Japan, the United States, France, Canada, and Australia. Second tier countries are all countries not in the first or third tier. Third tier countries are defined as countries identified as "emerging" or "developing" by the International Bank for Reconstruction and Development (also known as the "World Bank") or the International Finance Corporation.
 - (16) Regional subaccounts must be invested in a minimum of three countries and the name of the subaccount must accurately describe the subaccount. Similarly, a subaccount that uses the name of a single country to describe it must make substantial investments in that country and the name of the subaccount must accurately describe the nature of the subaccount.
- (h) Notwithstanding the above presumptive factors, the Commissioner reserves the right to review for possible hazardous conditions any variable contract if there is good cause to believe that the issuance of such contract may pose a hazard to California

policyholders or the public. The Commissioner may also review any variable contract if there is good cause to find that any material risk is not being adequately disclosed.

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.

§2534.46. Completeness Review of Variable Product Filings.

- (a) The following documents fully and accurately completed, must be included in a submission of an amended variable annuity or amended variable life application. All documents in a submission must be presented in the same order as indicated below. Any submission not in compliance with the following requirements or presented in the following order will be returned to the filer.
- (1) Filings must contain a cover letter explaining the nature of the filing. The letter should explicitly indicate the names of each Mutual Fund being used as an underlying investment for the variable product. The letter must explain if the subject of the filing is a new product, fund and/or subaccount. The letter must clearly indicate the nature of the proposed changes to the company's variable authority. For example, if the filer is using the Other Material Changes form, the nature of the changes to the insurer's variable authority must be clearly described in the cover letter. The letter shall name the person responsible for the filing and provide contact information for the responsible person. Such contact information shall contain an electronic mail address, if available.
 - (2) Filings must include a Certificate of Compliance as set forth in section 2534.47(a)(1) of this article. The Certificate must be notarized, dated and executed over the corporate seal. The Certificate must be executed by an executive officer of the insurer, who has responsibility for the insurer's variable contract operations. By executing the Certificate, the officer is attesting that he or she has read Title 10 Code of California Regulations sections 2534.40-2534.47. A New Matters Form, as set forth in section 2534.47(a)(2) of this article, must be completed setting out the changes being made in the variable product.
 - (3) If a new product is being introduced, a New Product Form, as set forth in section 2534.47(a)(3) of this article, must be completed. In addition, a currently effective product prospectus and Statement of Additional Information, as filed with the Securities and Exchange Commission, for the new product must be filed. The prospectus and Statement of Additional Information may be provided in CD-ROM form.
 - (4) If a new fund is being added, a New Fund Form, as set forth in section 2534.47(a)(4) of this article, must be completed. A currently effective Fund Prospectus and Statement of Additional Information must be included. If there have been any supplements to the prospectus or

Statement of Additional Information, they must also be included. Such documents may be provided in CD-ROM form.

- (5) If a new subaccount or portfolio is being added, a New Subaccount Form, as set forth in section 2534.47(a)(5) of this article, must be completed.
 - (6) For all other material changes, an Other Material Changes form, as set forth in section 2534.47(a)(6) of this article, must be completed.
 - (7) Filings concerning new subaccounts may not contain more than 25 new subaccounts per product and a New Subaccount Form should be completed for each new subaccount. If an insurer is adding more than 25 new subaccounts, the filing must be divided into two or more separate filings. For example, a filing adding 30 new subaccounts must be divided into one filing with 25 new subaccounts and another filing with five new subaccounts.
 - (8) Copies of any previous acknowledgment letters for the new fund(s) and/or subaccount(s) that were issued pursuant to Insurance Department Bulletin 97-2.
 - (9) If the filing concerns a private placement investment, the Private Placement Memorandum to the Securities and Exchange Commission must be provided, if one exists.
 - (10) If there are investment guidelines or restrictions that are not contained in the currently effective Fund Prospectus and Statement of Additional Information, they must be filed at the time of the application.
 - (11) The applicable fees pursuant to Insurance Code sections 10506.2 and 12978.
 - (12) The Commissioner shall determine whether a filing for a material change is complete and complies with filing requirements. If the filing for a material change includes the forms listed in sections 2534.46 and 2534.47 of this article and the data required therein, the filing is complete.
- (b) Filings shall addressed to California Department of Insurance, Policy Approval Bureau, 45 Fremont Street, 24th Floor, San Francisco, California 94105.
- (c) If the Commissioner determines that a filing for a material change fails to comply with filing requirements or is incomplete, the Commissioner shall issue a letter rejecting the filing for a material change.

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.

§2534.47. Forms

(a) The following forms shall be used pursuant to this article:

(1) Certificate of Compliance:

**VARIABLE CONTRACT CERTIFICATE OF
COMPLIANCE**

Name of Applicant Company:

Address:

Date:

Person to Whom Correspondence Should Be Addressed:

(Directions: This Certificate may be utilized in lieu of applicant seeking a prior approval of its changes in its variable contract operation; such an approval being based upon a full review by the Department. This Certificate must be executed by an executive officer of the applicant, who has responsibility for applicant's variable contract operation. Please answer each question in the accompanying Forms completely. If more room is needed, attach a sheet of paper indicating the question being responded to.)

TO THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA

I, [_____], a duly appointed executive officer of the Applicant Company, having responsibility for its variable contract operation, do state, under oath, that I have carefully read this Certification and the attached Forms, and that the information and answers to questions herein is true to the best of my own knowledge, except as to those specifically stated to be upon information and belief, and as to those I believe the answers to be true.

Further I state that the variable contract changes described herein comply with pertinent statutes, regulations, and bulletins, and have been reviewed by me, or that I have been

advised by competent legal counsel, representing the company, that the changes are in full compliance with the California Insurance Code, Regulations, Bulletins, and underlying guidelines. In particular, I state that this filing complies with Title 10 California Code of Regulations sections 2534.40-2534.47.

All material changes occurring since my company's most recent amendment of its variable contract qualification, (and the approval or acknowledgment by the Department of that amendment), are explained and described herein, or in accompanying materials and documentation. The information given here does not relate to any changes previously submitted to the Department and disapproved by the Department, unless corrective action has been taken by my company to meet the objections previously stated by the Department to those changes.

I understand and acknowledge that false statements which are intended to mislead or deceive the Commissioner, or the willful omission of any material fact with the same intent, may be punishable under such sections of the Insurance Code as may be applicable.

WITNESS MY SIGNATURE this [] day of [], [], at [].

Signature []
(Affiant)

[]
(Printed or typed name and title)

SUBSCRIBED AND SWORN TO before me on the date and year above written.

[]
(Notary Public in and for said County and State)

My commission expires []

(2) New Matters Form:

DESCRIPTION OF NEW MATTERS FORM

1. **Background Information:**

- a. Applicant's name:
- b. Applicant's state of domicile:
- c. Date of applicant's California Certificate of Authority:
- d. Date of applicant's original qualification for California Variable Authority:
- e. Date and type of applicant's last amendment to its California Variable Authority:
- f. What variable products is the applicant currently offering in California?
- g. Has the applicant ever been subject to a regulatory disciplinary action, at either a state or federal level, for actions arising out of its variable annuity or variable life business? If yes, identify each action:

2. What amendments to the applicant's current variable qualification are being requested in this application? (Be sure to include a new product form, new fund form, new subaccount/portfolio form and/or other material changes form for each applicable amendment).

- a. New Product:
- b. New Fund:
- c. New Subaccount/Portfolio:

d. Other Material Changes:

3. Is this application being filed under the expedited filing procedure set forth in these regulations? If yes, has the applicant included an original certificate of compliance?
4. If the amendments set forth in the application require a filing with the Securities and Exchange Commission, the application must include an effective prospectus and statement of additional information. **Applications for amended variable qualification will not be accepted for filing until an effective prospectus has been submitted.**

(3) New Product Form

NEW PRODUCT FORM

1. **PRODUCT NAME:** What is the name of the New Product?
2. **PRODUCT DESCRIPTION:** Provide a brief description of the New Product.
3. **POLICY FORM:** Attach a specimen copy of the New Product policy form.
4. **MARKETING:** How will this new product be marketed? Who will be the target market for this new product? Attach copies of any advertising or marketing information that will be distributed to the applicant's marketing agents and/or sales force.
5. **DISTRIBUTION:** How will the New Product be distributed? Will a third party handle distribution? If yes, attach a copy of the distribution agreement.
6. **ADMINISTRATION:** Will the administration of this New Product be delegated to a third party? If yes, attach a copy of the administration agreement. Administration of a life or annuity product by a third party will require a third party administrator's license (California Insurance Code Section 1759).
7. **SALES COMMISSION:** What is the sales commission on this New Product?

8. **SURRENDER CHARGE:** What is the surrender charge on the New Product?
9. **CONTRACT FEE:** What is the annual contract fee on this New Product?
10. **MORTALITY AND EXPENSE RISK CHARGES:** What are the mortality and expense risk charges on this New Product?
11. **PRODUCT PROSPECTUS AND STATEMENT OF ADDITIONAL INFORMATION:** Does this new product require the filing of a prospectus with the Securities and Exchange Commission? If yes, attach a copy of the product prospectus and statement of additional information. (All insurers must provide an effective product prospectus and statement of additional information before an application to amend their variable qualification will be accepted for filing).
12. **PLAN DOCUMENTS:** If this New Product is not subject to filing with the Securities and Exchange Commission, attach a copy of the Plan Documents or other documentation which provides information about the new product.

(4) New Fund Form:

NEW FUND FORM

1. **FUND NAME:** What is the name of the New Fund?
2. **INVESTMENT ADVISOR:** Who is the investment advisor for the new fund?
Attach a copy of the investment advisory agreement.
3. **DISTRIBUTOR:** Who is the distributor (broker/dealer) for the New Fund?
4. **USE OF FUND(S) BY OTHER INSURANCE COMPANIES:** Has this New Fund ever been qualified for use in California as an investment for variable products? If yes, please provide the names of the insurance companies you know are qualified to offer this fund.
5. **SECURITIES AND EXCHANGE COMMISSION DISCIPLINARY ACTION:** Has this New Fund, its investment advisor or its broker-dealer been subject to any Securities and Exchange Commission disciplinary action within the past ten years? If yes, attach a copy of each action.
6. **FUND PROSPECTUS AND STATEMENT OF ADDITIONAL INFORMATION:** Does this New Fund require a filing with the Securities and Exchange Commission? If yes, attach a copy of the effective fund prospectus and statement of additional information. The fund prospectus and statement of additional information must be effective before the application for amended variable qualification will be accepted for filing.
7. **PLAN DOCUMENTS:** If the New Fund is not subject to filing with the Securities and Exchange Commission, attach a copy of the Plan Documents or other documentation which provides information about the New Fund.

(5) New Subaccount Form:

NEW SUBACCOUNT FORM

1. **SUBACCOUNT NAME:** What is the name of the New Subaccount?
2. **INVESTMENT OBJECTIVE:** What is the principal investment objective of the New Subaccount?
3. **SUBACCOUNT MANAGER:** Who is the Subaccount manager for the New Subaccount?
4. **FEES:** Are any fees charged by the New Subaccount? If yes, identify each charge.
5. **SECURITIES AND EXCHANGE COMMISSION DISCIPLINARY ACTION:** Has the New Subaccount or its portfolio manager been subject to any Securities and Exchange Commission disciplinary action within the past ten years? If yes, attach a copy of the action.
6. **PROSPECTUS AND STATEMENT OF ADDITIONAL INFORMATION:** Does the New Subaccount require a filing with the Securities and Exchange Commission? If yes, attach a copy of the effective product and/or fund prospectus and statement of additional information relating to the addition of this New Subaccount. The product and/or fund prospectus must be effective before the application for amended variable qualification will be accepted for filing.
7. **PLAN DOCUMENTS OR OTHER INFORMATIONAL MATERIAL:** If the New Subaccount is not subject to Securities and Exchange Commission filing, attach a copy of the Plan Documents or other informational material which provides information about the subaccount/portfolio.

(6) Other Material Changes Form:

OTHER MATERIAL CHANGES

1. **OTHER MATERIAL CHANGES:** Identify any material changes to the applicant's current variable qualification.

(Examples of material changes are as follows: 1) change of custodian; 2) change of administrator; 3) change of broker/dealer; 4) change of investment advisor; 5) change of portfolio manager; 6) change in fund or portfolio name; 7) change in fund or portfolio investment objective; 8) Securities and Exchange Commission disciplinary action against fund, investment advisor, portfolio manager or broker/dealer; 9) regulatory action against the insurer arising out of its variable annuity or variable life business; 10) amendments to: a) the Board of Directors resolutions, b) the agreement establishing the separate account, c) the variable contract, or d) registration statement or prospectus; and 11) any substantial change in management of the Separate Account).

2. **PROSPECTUS AND STATEMENT OF ADDITIONAL INFORMATION:** If filing with the Securities and Exchange Commission is required for any of the changes listed above, attach a copy of the effective prospectus and statement of additional information which reflects these changes.
3. **PLAN DOCUMENTS:** If filing with the Securities and Exchange Commission for any of the changes identified above is not required, attach a copy of the Plan Documents or other documentation which provides information about these changes.

NOTE: Authority cited: Section 10506, subdivision (h) Insurance Code. Reference: Section 10506, subdivision (h) Insurance Code.